Supreme Court, U.S.
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No. 98-957

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SHARPER IMAGE CORPORATION,
Petitioner,

v.

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT A. BUTTERWORTH
Attorney General
JOSEPH C. MELLICHAMP, III
Senior Assistant Attorney General
Tax Section, Capitol Building
Tallahassee, FL 32399-1050
(850) 414-3300

H. BARTOW FARR, III *
FARR & TARANTO
1850 M Street, N.W.
Washington, D.C. 20036
(202) 775-0184

*Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the State of Florida is required to provide a refund of use taxes, or other relief, to a distributor of advertising catalogs on the ground that newspapers and religious publications were not subject to the use tax.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Petitioner Sharper Image Corporation ("Sharper Image") sells merchandise in stores and through mail and telephone home orders. As part of its marketing operations, it distributes, through contractors, catalogs advertising its products. The catalogs contain descriptions of the various products offered for sale, as well as order forms and other information regarding purchase of the products.

The State of Florida imposed a use tax on the distribution of the Sharper Image catalogs within Florida for the

period between April 1, 1987 and March 31, 1990. In 1994 Sharper Image filed suit to challenge the tax, asserting several grounds for relief. Its primary argument, no longer relevant here, was that the tax was improperly levied under Florida law. In addition, Sharper Image argued that the State had unconstitutionally discriminated against its advertising material by exempting newspapers and religious publications from the tax.

The circuit court entered summary judgment for the Department of Revenue. *See* Pet. App. 17a. In its order, the court first held that taxation of the catalogs was proper under Florida law. It then went on to find that Sharper Image had raised no constitutional issues warranting relief. *See* August 26, 1996 Order at 3 ("there are no State o[r] Federal constitutional problems present in this case").

The district court of appeal affirmed. It agreed with the circuit court that Florida law did not bar imposition of the tax on Sharper Image. *See* Pet. App. 3a-7a. With respect to the constitutional claims, the court of appeal noted that "the Florida Supreme Court has declared the newspaper exemption in section 212.08(7)(w), Florida Statutes (Supp. 1988), unconstitutional," Pet. App. 10a (citing *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459 (Fla. 1992)), and further observed that this Court had "held that a sales tax exemption for religious publications violated the First Amendment . . . ." Pet. App. 10a-11a (citing *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)).[1] The court concluded, however, that Sharper Image was not entitled to the relief that it sought. *See* Pet. App. 3a, 11a-16a.

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[1] The court of appeal also said that "it does appear . . . that appellant has standing." Pet. App. 10a (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So.2d 459, 462-63 (Fla. 1992)).

The court of appeal rested its denial of relief on two principal grounds. First, the court determined that, under state law, the proper remedy for an unconstitutional exemption was to eliminate the exemption, not the tax. Pet. App. 13a-14a.[2] Second, the court pointed out that the exemptions at issue here, unlike the preferences at issue in the *McKesson* case, did not place the complaining taxpayer at a competitive disadvantage. *See* Pet. App. 15a ("[n]othing in the record before us leads us to indulge a presumption that newspapers and religious publications have gained a competitive advantage over Sharper Image's catalog by virtue of the challenged exemptions"). The court thus determined that Sharper Image was not entitled to relief. The Supreme Court of Florida subsequently declined review. *See* Pet. App. 1a.

ARGUMENT

The petition for certiorari should be denied. Although the Florida court of appeal took too narrow a view of the proper remedies for constitutional violations, the fact is that Sharper Image has no right to a remedy of any kind. To the extent that Sharper Image is seeking to invoke the claim of discrimination at issue in *Magazine Publishers*—that is, discrimination among distributors of *noncommercial* speech—it (as a distributor of *commercial* speech) is simply not within the category of taxpayers entitled to object to that discrimination. It thus lacks standing to pursue that claim. To the extent that Sharper Image is seeking to raise its own, quite different claim of discrimination—that is, discrimination between distributors of commercial and noncommercial speech—

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[2] Relying on its own opinion in *Newsweek, Inc. v. Department of Revenue*, 689 So.2d 361 (Fla. 1st DCA 1997)—a decision later vacated by this Court (118 S. Ct. 904 (1998))—the court of appeal distinguished the ruling in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), on the ground that Sharper Image had available to it, and in fact had invoked, an adequate predeprivation procedure for challenging the tax. Pet. App. 11a-13a.

its argument borders on the frivolous. Nothing in the First Amendment requires a State to subsidize commercial speech, either directly or indirectly through tax exemptions, merely because it subsidizes some forms of noncommercial speech. Indeed, any such proposition would run counter to a long history of subsidies making precisely that distinction.

Sharper Image fares no better in its challenge to the exemption for religious publications. Whatever may be the limitations on the right to exempt religious publications from a generally applicable tax, *see Texas Monthly v. Bullock, supra,* it is implausible to think that the Establishment Clause eliminates any and all distinctions between the treatment of religious speech and commercial advertising. Sharper Image is not a similarly-situated taxpayer, disfavored solely because its discussion of public issues does not focus on religion, but rather a taxpayer that does not discuss public issues of any sort. Again, therefore, either Sharper Image is not in the class of taxpayers entitled to complain about the exemption, or, if it is, then its claim is utterly meritless. One way or the other, it is not entitled to any relief.

This case, therefore, is of no general importance. Although the opinion below rested upon the wrong ground, the judgment below (denying relief to petitioner) is nonetheless correct. Furthermore, that portion of the opinion dealing with remedies for unconstitutional taxation is of limited practical effect. It represents nothing more than the analysis of an intermediate state court, and the State has now acknowledged that some of that analysis is in error, thus minimizing its significance for future cases. There is no reason for further review.

A. *Sharper Image Is Not Entitled To Relief*

1. We acknowledge that, insofar as the district court of appeal indicated that the State need not provide relief to a taxpayer establishing unconstitutional discrimina-

tion in a predeprivation challenge, its position is inconsistent with the principles set forth in *McKesson* and *Newsweek*. *See also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993); *Reich v. Collins*, 513 U.S. 106 (1994). Taken together, those decisions indicate that a State generally must provide an adequate remedy to taxpayers successfully challenging state taxes on federal constitutional grounds—so long, of course, as they meet all other legitimate requirements—regardless of whether the taxpayers pursue predeprivation or postdeprivation procedures.[3] Although the remedy need not be a refund of taxes paid (or a release from the obligation to pay them), *see McKesson*, 496 U.S. at 40 & n.23, it must be sufficient to address the particular nature of the constitutional violation for the period of taxation in question. *See id.* at 36-49. In its mistaken reliance on its earlier opinion in *Newsweek*—not yet vacated by this Court—the court of appeal did not fully recognize that obligation.

The court of appeal need never have reached the issue of remedy, however, for it is readily apparent that Sharper Image has no serious constitutional objection to the tax imposed on it. To begin with, there is no merit whatever to the claim that Florida cannot subsidize, through tax exemptions, certain types of noncommercial speech (*e.g.*, newspapers) without also subsidizing commercial speech (*e.g.*, the Sharper Image catalogs).[4] Although this Court

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[3] A State, however, may decline to provide a remedy to taxpayers that bypass an available predeprivation procedure, *McKesson*, 496 U.S. at 38 n.21, so long as it makes clear that taxpayers do not have the option of waiting and electing a postdeprivation procedure. *See Reich*, 513 U.S. at 110-11; *Newsweek*, 118 S. Ct. at 904-05. It may also deny relief to taxpayers that fail to comply with other legitimate state requirements. *See McKesson*, 496 U.S. at 45.

[4] The Department of Revenue, in its brief submitted to the court of appeal, specifically argued that "[t]he difference in the taxation of publications and advertising is legitimate and supportable." Br. at 29. It is thus entitled to defend the judgment below on that ground. *See Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

has indicated that the First Amendment imposes some restraints on governmental power to subsidize speech—whether directly through cash grants or indirectly by means of tax exemptions, *see Arkansas Writers' Project*, 481 U.S. at 227-33; *Leathers v. Medlock*, 499 U.S. 439, 447 (1991); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2179 (1998)—it has never held, or even suggested, that the lawfulness of a subsidy for noncommercial speech turns on the existence of a comparable subsidy for commercial speech. To the contrary, to the extent that the Court has addressed concerns about discriminatory governmental subsidies, it has been discrimination *among* categories of noncommercial speech that raised the possibility of harm to the marketplace for speech. *See, e.g., Arkansas Writers' Project, supra; Leathers v. Medlock, supra.* That kind of discrimination has no application to Sharper Image, which limits its catalogs to the promotion of its products. *See* pages 7-8 *infra.*

It would be anomalous, in fact, to hold that the First Amendment requires equivalent subsidies for commercial and noncommercial speech. This Court has made clear that "differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 499 U.S. at 447. But, as the Court has frequently observed, the defining characteristic of commercial speech —*i.e.*, that it is speech aimed at encouraging a commercial transaction (*see Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980))—means that it is hardier by nature and less prone to governmental suppression. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978) (commercial speech "is not as likely to be deterred as noncommercial speech . . . ."). It follows that commercial speech is also less in need of governmental encouragement, either in the form of supporting grants or exemption from taxation.

The notion that the First Amendment requires equal subsidies for commercial and noncommercial speech would also be contrary to longstanding, well-accepted practice. For example, the very distinction about which Sharper Image complains—the distinction between publications of general interest and advertising circulars—is embodied in regulations promulgated under the federal postal code. *See* 39 C.F.R. Ch. III (7-1-98 ed.) Pt. 3001 Subpt. C, App. A §§ 412.2, 412.4. Those regulations incorporate a special classification for "General Publication[s]," which are defined as publications "originated and published for the purpose of disseminating information of a public character, or devoted to literature, the sciences, art, or some special industry" (§ 412.2); the regulations expressly *deny* that classification to publications "designed primarily for advertising purposes" (§ 412.4). More generally, the Corporation for Public Broadcasting distributes federal funds to noncommercial television and radio stations on the express condition that recipients of its funding not carry advertisements. *See* 47 U.S.C. § 399(b)(2) ("[n]o public broadcast station may make its facilities available to any person for the broadcasting of any advertisement"). If the First Amendment required equal subsidies for commercial and noncommercial speech, not only would this condition be unlawful, but it would seem that Congress would actually have to disperse federal funds to support commercial advertising as well. There is no basis in First Amendment doctrine for that unlikely conclusion.

Perhaps aware that its own claim is meritless, Sharper Image has tried to tie itself to a different, more reasonable claim: that a State cannot subsidize certain noncommercial publications without subsidizing other noncommercial publications. *See Department of Revenue v. Magazine Publishers of America, Inc., supra.* But this type of discrimination—the basis for the successful challenge to the newspaper exemption in *Magazine Publishers*—is one of which Sharper Image cannot rightfully complain. Any discrimination *within* the class of noncommercial pub-

lishers is of no consequence to Sharper Image, which is not itself within the class. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (denying standing to party not "among [those] injured" by the challenged law) (internal quotation omitted). Sharper Image thus runs afoul of the general rule that a litigant must assert its own rights, not the rights of third parties. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (noting "general prohibition on a litigant's raising another person's legal rights"); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The Court has recognized some exceptions to the general rule, *see Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989), but Sharper Image does not fall within them. Most obviously, there is no impediment to First Amendment challenges brought by noncommercial publishers themselves: not only have such challenges been prosecuted, but it is the favorable outcome of an earlier suit brought by noncommercial magazine publishers that Sharper Image now seeks to capitalize on. Nor can Sharper Image rely on concerns about "overbreadth." Even if that doctrine applied to commercial speech—which it does not (*see Waters v. Churchill*, 511 U.S. 661, 670 (1994))—Sharper Image could not claim that its present suit is necessary to prevent a "chill" on the rights of other publications because it is seeking retroactive relief for years long past. Sharper Image thus cannot piggyback on the claims of noncommercial publishers, a class to which it does not belong.[5]

The end result is that Sharper Image has no serious grounds to challenge the newspaper exemption. Its own

[5] Sharper Image argues (Pet. 7 n.3) that this Court has "no occasion to revisit" the finding below that it has standing. This argument is incorrect. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623 n.2 (1989); *Doremus v. Board of Education*, 342 U.S. 429 (1952). In any event, our point is not that Sharper Image lacks any standing but, rather, that it lacks standing to make certain claims.

claim is feeble at best, and its derivative claim (asserting the rights of noncommercial publishers) is beyond its power to bring. There is thus no basis on which to award relief.

2. The same problems affect its challenge to the exemption for certain religious items (including religious publications). While it may be the case that an exemption for religious publications, to be valid, must encompass other types of publications as well, *see Texas Monthly*, 489 U.S. at 14-17 (plurality opinion); *id.* at 28-29 (Blackmun, J., concurring in the judgment), it stretches the Establishment Clause beyond recognition to say that it requires parity between taxation of religious matter and taxation of advertising catalogs. A challenge brought by charitable or educational publications subject to the tax, or even by other noncommercial publications, may raise plausible claims of unconstitutional favoritism, but, again, Sharper Image is not within the relevant class. Unless it means to argue that *any* taxpayer subject to the use tax can challenge the exemption for religious materials, Sharper Image would seem to stand on no better footing than any other purveyor of goods or services seeking to escape the tax.

It is also difficult to see just what the merits of its Establishment Clause claim might be. This Court has made plain that the Establishment Clause does not bar exemptions for religious publications under any and all circumstances, but only when the exemption is insufficiently broad. *See Texas Monthly*, 489 U.S. at 14-15 (plurality opinion); *id.* at 28-29 (Blackmun, J., concurring in the judgment). Any violation of the Establishment Clause thus arises, not from the fact that an exemption is provided, but from the fact that it is denied to similarly-situated publications, which are treated as different only because of their lack of religious content. But the Sharper Image catalogs, far from being similarly-situated, are different for a wholly distinct reason: they do not discuss public issues (religious or not) at all. To

deny a tax exemption to a purely commercial publication raises no concerns that the Establishment Clause can be reasonably thought to address.

B. *The Case Is of No General Importance*

The decision below, while resting on an admittedly erroneous ground, is not of any general importance. Here, the judgment of the district court of appeal was patently correct: petitioner is not, in fact, entitled to any relief. Its constitutional arguments—based on exemptions to which, as a practical matter, it could have no real objection[6]—are simply not enough to demonstrate a colorable violation of its own First Amendment rights, and, had it lost on that basis below, those arguments would not support plenary review by this Court. The error, therefore, is effectively harmless.

The decision of the court of appeal also is of limited precedential significance. First of all, it is not a decision of the state Supreme Court, but only of an intermediate appellate court. Under Florida law, therefore, the decision is not even binding on other state district courts of appeal. *See Pardo v. State*, 596 So.2d 665, 667 (Fla. 1992). Furthermore, the State, having acknowledged error below, will not be able to assert the decision as controlling authority to deny relief in other suits by taxpayers making constitutional objections. *But see* page 5 and note 3 *supra*. Those taxpayers may well be entitled to the type of relief sought by Sharper Image here, provided that they are able to do what Sharper Image cannot do: demonstrate that they have been subject to unconstitutional discrimination. There is thus no reason for further review here.

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[6] In this respect, the court of appeal was quite right: Sharper Image is not affected in any meaningful way, competitively or otherwise, by the existence of the challenged exemptions. *Cf. McKesson*, 496 U.S. at 48 (noting that taxpayer was put "at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
JOSEPH C. MELLICHAMP, III
Senior Assistant Attorney General
Tax Section, Capitol Building
Tallahassee, FL 32399-1050
(850) 414-3300

H. BARTOW FARR, III *
FARR & TARANTO
1850 M Street, N.W.
Washington, D.C. 20036
(202) 775-0184

*Counsel of Record